

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.4 “Assault” Offenses

A. Assault With Intent to Commit Criminal Sexual Conduct Involving Penetration

6. Pertinent Case Law—Affirmative Defenses

On page 46 replace the current paragraph in this sub-subsection with the following text:

Consent is not an affirmative defense to assault with intent to commit CSC if the victim is under sixteen years old because the victim is too young to consent. *People v Starks*, ___ Mich ___, ___ (2005). For more information on the consent defense, see Section 4.7.

CHAPTER 2

The Criminal Sexual Conduct Act

2.4 “Assault” Offenses

B. Assault With Intent to Commit CSC II—Contact

6. Pertinent Case Law—Affirmative Defenses

On page 48 replace the current paragraph in this sub-subsection with the following text:

Consent is not an affirmative defense to assault with intent to commit CSC if the victim is under sixteen years old because the victim is too young to consent. *People v Starks*, ___ Mich ___, ___ (2005). For more information on the consent defense, see Section 4.7.

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

B. “Age”

Replace the last three sentences in the first paragraph on page 49 with the following text:

Similarly, the consent of victims under age 16 is legally ineffective for the CSC “assault” offenses. *People v Starks*, ___ Mich ___, ___ (2005).^{*} For more information on the mistake-of-fact defense, see Section 4.11. For more information on the consent defense, see Section 4.7.

^{*}Overruling in part, *Worrell*, *supra* at 622.

CHAPTER 4

Defenses to Sexual Assault Crimes

4.7 Consent

A. Applicability to Criminal Sexual Conduct Offenses

On page 217 beginning with the second paragraph, delete the text through the end of subsection (A) and insert the following text:

Consent is no longer a defense to assault with intent to commit CSC involving sexual penetration when the victim is under 16 years of age. *People v Starks*, ___ Mich ___, ___ (2005). In *Sparks*, the Court overturned the holding in *People v Worrell*, 417 Mich 617, 621–623 (1983). In *Sparks*, the defendant was charged with assault with intent to commit CSC involving penetration, MCL 750.520g(1). At the preliminary hearing, the victim testified that when he was 13 years old, the defendant asked the victim if he would like her to perform fellatio on him. The victim did not respond, and the defendant told him to pull down his pants. The victim unbuckled his belt and undid his pants. The victim testified “that as the defendant was about to perform fellatio,” someone interrupted them. The district court dismissed the charge, finding no probable cause to believe that a crime was committed where the victim was never in fear of any battery.

On appeal, the Michigan Supreme Court stated:

“[O]ne is guilty of an assault when one attempts an intentional, unconsented, and harmful or offensive touching. Moreover, consent must be given by one who is legally capable of giving consent to the act. . . . MCL 750.520d(1)(a) states that a person is guilty of third-degree criminal sexual conduct if the person engages in sexual penetration with another person and that person is at least thirteen but younger than sixteen years old. Accordingly, a thirteen-year-old child cannot legally consent to sexual penetration with another person because sexual penetration of a thirteen-year-old child is automatically third-degree criminal sexual conduct.

* * *

“Therefore, *Worrell’s* incorrect conclusion that consent is always a defense to the crime of assault with intent to commit criminal sexual conduct involving sexual penetration is overruled.” [Citation and footnotes omitted.] *Starks, supra* at ____.

CHAPTER 4

Defenses to Sexual Assault Crimes

4.7 Consent

B. Consent Inapplicable to Certain CSC Offenses

1. Offenses Requiring Proof of Age

Replace the second sentence on page 218 with the following text:

Because a person under 16 years of age is incapable of legally consenting to a sexual act, consent is inapplicable for all CSC elements requiring proof of a victim's age. *People v Starks*, ___ Mich ___, ___ (2005), and *People v Cash*, 419 Mich 230, 247–248 (1984). The holding in *People v Worrell*, 417 Mich 617 (1983), that consent is a defense to assault with intent to commit CSC involving sexual penetration, even if the victim is under 16 years of age, was overruled by the Court in *Starks*, *supra*.